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**IN THE  
COURT OF APPEALS OF INDIANA**

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DACIA WARD,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 84A05-0601-CR-27

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APPEAL FROM THE VIGO SUPERIOR COURT  
The Honorable David R. Bolk, Judge  
Cause Nos. 84D03-0509-FD-2554, 84D03-0408-FB-2039

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**September 29, 2006**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**MAY, Judge**

Dacia Ward appeals his conviction after a jury trial of theft, a Class D felony.<sup>1</sup> The admission of evidence of other misconduct by Ward was not fundamental error, and the evidence was sufficient to support Ward's conviction. Because Ward did not submit a lesser-included offense instruction, he has waived his allegation of instructional error. We accordingly affirm.

### **FACTS**

On September 16, 2005, someone awakened Teresa Prince at approximately 3:00 a.m. by knocking on her front door. She saw a man wearing a black baseball cap and carrying an orange backpack. He was yelling, "Becky, let me in." (Tr. at 220.) Prince called the police and the man left.

Terre Haute Police Officer Scott Sevigny received the dispatch regarding Prince's complaint. As he approached the area, he saw Ward, who matched the description Prince had given. Officer Sevigny ordered Ward to stop. As Ward stopped he dropped something. Ward was restrained and placed in the police car.

Employees from a nearby business, the Gartland Foundry, approached Officer Sevigny and told him they had chased Ward out of their employee parking lot. They had seen Ward searching around in James Alexander's vehicle. The object Ward had dropped was a receipt for Alexander's paycheck stub from the foundry. A tire pressure gauge belonging to Alexander was found in the backpack.

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<sup>1</sup> Ind. Code § 35-43-4-2.

Terre Haute Police Detective Jeremy Sparks investigated further and found the backpack belonged to Brandy Griffith's daughter. Griffith checked her car and found that a door had been left ajar, items were moved around inside the car, and an orange backpack was missing. Griffith lived four blocks from the Gartland Foundry. The charging information indicates Ward was charged only with the theft of Griffith's property and not that of Alexander.

### **DISCUSSION AND DECISION**

#### **1. 404(B) Evidence**

Ward filed a motion *in limine* to prohibit the State from admitting evidence of "certain alleged other misconduct" by Ward. (App. at 30.) The motion was denied. Ward contends the evidence given by Gartland Foundry employees with respect to his actions and his possession of John Alexander's check stub and tire pressure gauge should not have been admitted.

Ward did not object at trial to any of this testimony. As a result, this allegation of error is waived, *Earlywine v. State*, 847 N.E.2d 1011, 1013 (Ind. Ct. App. 2006), unless the error is fundamental. *Ritchie v. State*, 809 N.E.2d 258, 273 (Ind. 2004). To be "fundamental" in this context, the error must amount to a blatant violation of basic principles, the harm or potential for harm must be substantial, and the resulting error must deny the defendant fundamental due process. *Riehle v. State*, 823 N.E.2d 287, 295 (Ind. Ct. App. 2005), *trans. denied* 831 N.E.2d 746 (Ind. 2005). Indiana Evidence Rule 404(b) provides in relevant part: "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may,

however, be admissible for other purposes, such as proof of motive, intent, preparation, plan, knowledge, identity or absence of mistake or accident . . . .”

The purpose of the rule is to prevent the jury from making the forbidden inference that the defendant has a criminal propensity and therefore engaged in the presently charged conduct. *Riehle*, 823 N.E.2d at 295. Evidence that might be excluded by Evid. R. 404(b) can be admissible if it is relevant to an issue other than the defendant’s criminal propensity. *Boone v. State*, 728 N.E.2d 135, 138 (Ind. 2000), *reh’g denied*.

Ward told police he had found the backpack and was trying to return it to its owner, who he said was Amy Fisher. Ward also placed his knowledge and intent in issue during cross-examination, when he questioned the police about attempts to locate Amy Fisher and other people Ward mentioned. The evidence Ward had Alexander’s check stub and pressure gauge showed a similarity to the Griffith crime, which had also involved rummaging around in a car and taking items. As a result, the Alexander evidence was relevant and admissible. *See Pope v. State*, 740 N.E.2d 1247, 1250 (Ind. Ct. App. 2000) (evidence of uncharged misconduct that is “inextricably bound up” with the charged offense is properly admissible under Evid. R. 404).

The evidence was not unfairly prejudicial. It was clear from both the trial testimony and the charging information that Ward had not been charged with anything related to the Alexander evidence. Far more damning was Ward’s possession of Griffith’s orange backpack.

2. Instruction

Ward argues the jury should have been instructed on criminal conversion as a lesser-included offense of theft. However, Ward failed to offer a lesser-included offense instruction. As a result, this allegation of error has been waived. *See Conner v. State*, 829 N.E.2d 21, 24-25 (Ind. 2005) (allegation of instructional error was unavailable on appeal because defendant did not request a lesser-included offense instruction).

3. Sufficiency of the Evidence

Ward contends the evidence is insufficient to sustain his conviction because the information states the backpack stolen was that of Brandy Griffith, while the evidence at trial was that the backpack belonged instead to Griffith's fourth-grade daughter. Ward cannot be heard to complain that the wording of the information somehow misled him, as he made no objection at trial.

Notwithstanding his waiver of this allegation of error, we note

[t]he rights to be examined in determining whether or not a theft has been committed are the rights of the person in possession of the property and the rights of the person who took such possession from him. The relative rights of the possessor and third parties with respect to such property are irrelevant.

*Murphy v. State*, 453 N.E.2d 219, 221 (Ind. 1983). The backpack was owned by Griffith's daughter but was in Griffith's lawful possession because it was in her car. There was ample evidence Ward took unlawful possession of the backpack.

Affirmed.

BAILEY, J., and RILEY, J., concur.